IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 1999 Session

PLANNED PARENTHOOD OF MIDDLE TENNESSEE, ET AL. v. DON SUNDQUIST, GOVERNOR OF THE STATE OF TENNESSEE, ET AL.

Appeal by Permission from the Court of Appeals, Middle Section
Circuit Court for Davidson County
No. 92C-1672 Hamilton V. Gayden, Jr., Judge

No. M1996-00060-SC-R11-CV - Filed September 15, 2000

This is an appeal from the Circuit Court for Davidson County, which applied an undue burden standard and struck down as unconstitutional the provisions of Tennessee's criminal abortion statutes requiring that physicians inform their patients that "abortion in a considerable number of cases constitutes a major surgical procedure," Tenn. Code Ann. § 39-15-202(b)(4) (1997), and mandating a two-day waiting period requirement, § 39-15-202(d)(1). The trial court upheld the second trimester hospitalization requirement, § 39-15-201(c)(2), the remaining informed consent requirements, § 39-15-202(b)(1)-(3), (b)(5)-(c), and the medical emergency exceptions, § 39-15-202(d)(3), (g). The Court of Appeals reversed the judgment of the trial court in part and affirmed in part. The Court of Appeals upheld the following provisions as not imposing an undue burden: the waiting period requirement, based upon the facts of this case, the second trimester hospitalization requirement, and, except for the "major surgical procedure" provision, the remaining informed consent requirements. We granted application for permission to appeal those issues of first impression. We specifically hold that a woman's right to terminate her pregnancy is a vital part of the right to privacy guaranteed by the Tennessee Constitution. We further hold that the right is inherent in the concept of ordered liberty embodied in our constitution and is therefore fundamental. Accordingly, the statutes regulating this fundamental right must be subjected to strict scrutiny analysis. When reviewed under the correct standard, we conclude that none of the statutory provisions at issue withstand such scrutiny. The Court of Appeals' judgment is therefore affirmed in part and reversed in part.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Affirmed in Part and Reversed in Part; Case Remanded to Trial Court.

E. RILEY ANDERSON, C. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, ADOLPHO A. BIRCH, JR., and JANICE M. HOLDER, JJ., joined. WILLIAM M. BARKER, J., filed a dissenting opinion.

Barry Friedman, Vanderbilt University School of Law, Nashville, Tennessee; Irwin Venick, Nashville, Tennessee; Elizabeth B. McCallum, Washington, D.C.; Barbara E. Otten, Dara Klassel, and Roger K. Evans, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., New York, New York; Louise Melling and Catherine Weiss, AMERICAN CIVIL LIBERTIES FOUNDATION REPRODUCTIVE FREEDOM PROJECT, New York, New York, attorneys for the appellant, Planned Parenthood of Middle Tennessee, et al.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Andy D. Bennett, Chief Deputy Attorney General; and Michael W. Catalano, Associate Solicitor General, attorneys for the appellees, Don Sundquist, Governor of the State of Tennessee, et al.

Miranda Schiller and Ilyssa M. Birnbach, New York, New York, and Dianna Baker Shaw, Nashville, Tennessee, attorneys for Amicus Curiae, American College of Obstetricians and Gynecologists.

Kevin H. Theriot, Panama City Beach, Florida; Larry L. Crain, Brentwood, Tennessee; and Gary S. McCaleb, Scottsdale, Arizona, attorneys for Amicus Curiae, Tennessee Right to Life.

Elizabeth Cavendish and Scott Grogan, Washington, D.C., and Ann Martin, Nashville, Tennessee, attorneys for Amici Curiae, The National Abortion and Reproductive Rights Action League, The NARAL Foundation, The League of Women Voters of Tennessee, The Tennessee Task Force Against Domestic Violence, and the National Council of Jewish Women.

Paul Benjamin Linton, Northbrook, Illinois, and Clinton W. Watkins, Brentwood, Tennessee, attorneys for Amici Curiae, Members of the Tennessee General Assembly.

Keith Jordan, Nashville, Tennessee, and J. Thomas Smith, Franklin, Tennessee, attorneys for Amicus Curiae, Dr. Kent Jones, et al., on Behalf of the Tennessee Physicians Resource Council.

OPINION

We granted this appeal to review the constitutionality of Tennessee's abortion statutes, which restrict the circumstances under which a woman may obtain an abortion and impose criminal liability upon physicians who fail to comply with the statutory restrictions and requirements. After our review of the record and applicable authority, we conclude that the Court of Appeals erred in failing to apply the appropriate standard under the Tennessee Constitution. We conclude that a woman's right to terminate her pregnancy is a vital part of the right to privacy guaranteed by the Tennessee Constitution. As this right is inherent in the concept of ordered liberty embodied in the Tennessee Constitution, we conclude that the right to

terminate one's pregnancy is fundamental. The standard we have traditionally applied to fundamental rights requires that statutes regulating fundamental rights be subjected to strict scrutiny analysis. Moreover, when reviewed under the strict scrutiny standard, we conclude that none of the statutory provisions at issue withstand such scrutiny. The Court of Appeals' judgment is therefore affirmed in part and reversed in part.

I. PROCEDURAL BACKGROUND

The abortion statutes at issue in this appeal are codified at Tenn. Code Ann. §§ 39-15-201 and -202 (1997). Among other things, these statutes mandate that second trimester abortions be performed in a hospital, § 201(c)(2) (the second trimester hospitalization requirement); that the "attending physician" inform the patient of statutorily prescribed information, § 202(b), and (c) (the informed consent and physician only counseling requirements); that after receiving this information, the patient must wait a mandatory two-day period before returning to the attending physician, signing a consent form, and obtaining the abortion, § 202(d)(1) (the mandatory waiting period requirement); and, finally, that medical emergency exceptions to the two-day waiting period requirement and the informed consent requirements are permitted when the patient's life would otherwise be in danger, § 202(d)(3), and (g) (the medical emergency exceptions).[1]

Plaintiffs, including Planned Parenthood Association of Nashville, Inc., Memphis Planned Parenthood, Inc., Washington Hill, M.D., Peter Cartwright, M.D., and Frank Boehm, M.D., [hereinafter "Planned Parenthood"], filed suit in the Davidson County Circuit Court seeking declaratory and injunctive relief under both the state and federal constitutions. Planned Parenthood alleged that certain provisions of Tennessee's criminal abortion statutes, including those listed above, violate a woman's rights to liberty, privacy, procreational autonomy, due process, equal protection of the laws, freedom of travel, freedom of conscience, and freedom of speech under article I, §§ 1, 2, 3, 7, 8, 19, 27 and article XI, §§ 8, 16 of the Tennessee

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[1] For clarification, we note that the following issues are not before this Court: the provision requiring that a woman seeking an abortion be a Tennessee resident, Tenn. Code Ann. § 39-15-201(d); the provisions regulating abortions performed on minors, Tenn. Code Ann. § 39-15-202(f)(Supp. 1989) (repealed) (now codified at Tenn. Code Ann. §§ 37-10-301 through -307); and the provision banning post-viability abortions except to preserve the life or health of the woman, Tenn. Code Ann. § 39-15-201(c)(3).

The State chose not to defend the constitutionality of the residency requirement, and the trial court struck it as unconstitutional. Regarding the provisions regulating minors' abortions, Tenn. Code Ann. § 39-15-202(f) contained a parental notification requirement, a waiting period requirement, and a medical emergency exception to these requirements when necessary "to preserve the life or health" of the pregnant minor, § -202(f). While the case was pending in the trial court, however, the General Assembly repealed the parental notification requirement. -202(f). See 1995 Tenn. Pub. Acts, ch. 458. The General Assembly replaced the parental notification requirement with the parental consent requirement, now Tenn. Code Ann. §§ 37-10-301 through -307. The Court of Appeals concluded that § 39-15-202(f) had been repealed by implication and refused to express an opinion regarding the constitutionality of Tenn. Code Ann. §§ 37-10-301 through -307. Plaintiffs did not challenge the provisions relating to post-viability abortions.

Constitution; and article I, § 8; article IV, § 2; and, the Fourteenth Amendment to the United States Constitution.

Planned Parenthood argued at trial that this Court's decision in Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992), recognized that the right to procreational autonomy is a fundamental right and that, consequently, Tennessee's criminal abortion statutes cannot be upheld because they are not narrowly tailored to further compelling state interests. The State argued that Davis should be abandoned in light of the United States Supreme Court's abortion decision in Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). In the Casey joint opinion, the "strict scrutiny" constitutional standard of review announced in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the standard most protective of fundamental constitutional rights, was abandoned, and the "undue burden standard," a standard which affords states broader powers to enact regulatory legislation, was adopted. Casey, 505 U.S. at 878, 112 S.Ct. at 2821 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)

The trial court applied the undue burden standard and struck down the waiting period requirement, Tenn. Code Ann. § 39-15-202(d)(1), and the informed consent subsection requiring that physicians inform their patients that "abortion in a considerable number of cases constitutes a major surgical procedure," § -202(b)(4). The trial court, however, upheld the second trimester hospitalization requirement, the remaining informed consent requirements, and the medical emergency exceptions.[2]

The Court of Appeals expressed the view that our description of the nature and scope of the right of procreational autonomy in Davis was based "exclusively on decisions of the United States Supreme Court,"[3] and that Planned Parenthood v. Casey's undue burden standard is consistent with the right of procreational privacy recognized in Davis. The Court of Appeals found that Casey's undue burden standard "appropriately balances a woman's right to procreational autonomy with the State's significant interest in protecting maternal health and potential human life" and adopted the undue burden standard.

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[2] The court construed the term "hospital" in the second trimester hospitalization requirement to include "ambulatory surgical center," Tenn. Code Ann. § 39-15-201(c)(2). The court further construed the medical emergency exception so as to extend protection for not only the "life," but also the "health" of the patient. Tenn. Code Ann. § 39-15-202(d)(3) .

[3] We emphasize at this point that the holding in Davis that the state constitution protects a right to privacy which includes procreational autonomy was based upon specific provisions of the Tennessee Constitution. Although we did not specifically rule in Davis as to whether the state constitutional right to procreational autonomy is broader than the federal constitutional right, we did not rest our holding with regard to the right to privacy on United States Supreme Court precedent. We reaffirm the holding that the right of privacy, including the right of procreational autonomy, arises from specific provisions of the state constitution, including article I, §§ 1 and 2 (providing that all power in inherent in the people and that the people may alter, reform, or abolish the government and that the doctrine of non-resistance against arbitrary power and oppression is destructive of the good and happiness of mankind). Tenn. Const. art. I, §§ 1 and 2. See also Tenn. Const. art. I, §§ 3, 7, 8, 19, and 27.

The Court of Appeals concluded that the following provisions are unconstitutional for imposing an undue burden: the residency requirement, Tenn. Code Ann. § 39-15-201(d); the informed consent subsection requiring that the attending physician inform the woman that "abortion in a considerable number of cases constitutes a major surgical procedure," Tenn. Code Ann. § 39-15-202(b)(4); the medical emergency exceptions, Tenn. Code Ann. § 39-15-202(d)(3), (g); and the attending physician counseling requirement, when combined with the waiting period requirement, Tenn. Code Ann. §§ 39-15-202(b), (d)(1). The Court of Appeals upheld the following provisions as not imposing an undue burden: the waiting period requirement, based upon the facts of this case, Tenn. Code Ann. § 39-15-202(d)(1), the second trimester hospitalization requirement, Tenn. Code Ann § 39-15-201(c)(2), and the remaining informed consent provisions, Tenn. Code Ann. § 39-15-202(b)(1)-(3), (b)(5)-(c).

We granted permission to appeal these issues of first impression.

II. DEVELOPMENT OF THE LAW REGULATING ABORTIONS

Tennessee has regulated the practice of abortions by statute since at least 1883, when all abortions were illegal except to preserve the "life" of the pregnant woman. 1883 Tenn. Pub. Acts, ch. 140 (codified as Tenn. Code § 5371 and 5372 (1884)). This statute was left largely unchanged until after the United States Supreme Court's decision in Roe v. Wade.

In Roe, the United States Supreme Court recognized that a woman has a fundamental right to terminate her pregnancy and that this right is deserving of heightened scrutiny against state restrictions. 410 U.S. at 154-55, 93 S. Ct. at 727-28. The Court further recognized, however, that the State has legitimate interests in health, medical standards, and potential life. Id. at 162-63, 93 S. Ct. at 731. Accordingly, the Court established a trimester framework pursuant to which the State's interests in maternal health and potential life are balanced against the woman's interest in procreational autonomy. Id. at 163-64, 93 S. Ct. at 731-32. Concluding that the State's interest in maternal health becomes compelling after the first trimester and that the State's interest in potential life becomes compelling after the second trimester, the United States Supreme Court struck down a Texas criminal abortion statute which, like Tennessee's statute, banned all abortions except to protect the woman's life. Id. at 164, 93 S. Ct. at 732.

After the Roe v. Wade decision, the General Assembly enacted Public Chapter 235, 1973 Tenn. Pub. Acts, ch. 235 (codified as Tenn. Code Ann. § 39-301 (Supp. 1973)), which adopted the trimester framework set forth in Roe and placed restrictions upon the exercise of that right depending upon the point in the pregnancy during which the woman seeks an abortion, i.e., the first, second, or third trimester, and upon whether she is a resident of Tennessee. In later years, the legislature enacted additional regulations. In 1974, the General Assembly increased the punishment for statutory violations. 1974 Tenn. Pub. Acts, ch. 471 (codified as Tenn. Code Ann. § 39-301 (1975)). Then, in 1978, the General Assembly provided for State custody of a fetus born alive during an abortion, 1978 Tenn. Pub. Acts, ch. 811, § 2 (codified as Tenn. Code Ann. § 39-307 (Supp. 1978)), and enacted the physician-only, informed consent requirements

and the waiting period requirement. 1978 Tenn. Pub. Acts, ch. 847 (codified as Tenn. Code Ann. § 39-302 (Supp. 1978)). This latter provision required the "attending physician" to orally inform the woman of statutorily prescribed information, to be followed by a two-day waiting period, before the woman may return to the physician, sign a consent form, and obtain the abortion. Id.[4] The legislature recodified the abortion statutes in 1989 as a part of a general re-enactment of Tennessee's criminal code. See 1989 Tenn. Pub. Acts, ch. 591, § 1, Tenn. Code Ann. §§ 39-15-201 through -208 (Supp. 1989); Planned Parenthood Ass'n v. McWherter, 817 S.W.2d 13, 16 (Tenn. 1991).

III. ANALYSIS

A. Standard of Appellate Review

This appeal involves a facial challenge to the constitutionality of a statute, and our review is de novo with no presumption of correctness given to the lower courts' judgments. State v. King, 973 S.W.2d 586, 588 (Tenn. 1998). However, there are certain rules which this Court must apply when considering a facial challenge to the constitutionality of statutes. We may only invalidate a statute when it contravenes either the federal or state constitution. See Holly v. City of Elizabethton, 193 Tenn. 46, 53, 241 S.W.2d 1001, 1004-05 (1951). We are not permitted to impose our policy views or to second guess the General Assembly's policy judgments. See Stein v. Davidson Hotel Co., 945 S.W.2d 714, 717 (Tenn. 1997). Indeed,

> [i]n construing statutes, it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution. State v. Sliger, 846 S.W.2d 262, 263 (Tenn. 1993); State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990); Shelby County Election Comm'n v. Turner, 755 S.W.2d 774, 777 (Tenn. 1988); Kirk v. State, 126 Tenn. 7, 10, 150 S.W. 83, 84 (1911). When faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid a conflict with the Constitution, and another which renders the statute unconstitutional, we must choose the former. Id.

Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 529-30 (Tenn. 1993).

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[4] Since their enactment, these provisions have been the subject of constitutional challenges in both state and federal court. See Planned Parenthood of Memphis v. Blanton, No. 78-2310 (W.D. Tenn. July 14, 1978) (continuing the temporary injunction against the waiting period requirements); Planned Parenthood of Nashville, Inc. v. Alexander, No. 79-843-II (Davidson Chanc. Oct. 19 & 24, 1979) (temporarily enjoining imposition of criminal penalties as related to informed consent and waiting period requirements); Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn. Mar. 23, 1981) (permanently enjoining enforcement of the 1978 waiting period statute).

We have carefully applied these principles to our review of the challenged statutes.

B. Standard of Constitutional Review

The initial issue which this Court must decide is whether the right of privacy implicated in this case as guaranteed by the Tennessee Constitution is broader than the right as guaranteed by the federal constitution and as construed by the United States Supreme Court. Implicit in this determination is whether the statutes at issue are to be judged under the less demanding undue burden standard, see Casey, 505 U.S. at 878, 112 S. Ct. at 2821, or the more stringent strict scrutiny standard. See Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993). Planned Parenthood argues that the state right to procreational autonomy is broader than the federal right and that the appropriate standard to apply is strict scrutiny. The State, on the other hand, asserts that the Court of Appeals correctly concluded that the appropriate standard to apply under the Tennessee Constitution is the "undue burden" standard adopted by the United States Supreme Court in Casey. See 505 U.S. at 874, 112 S. Ct. at 2819 ("Only where the state regulation imposes an undue burden on a woman's ability to make this decision [the decision of whether to undergo an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause").

1. United States Supreme Court Cases

In 1973, the United States Supreme Court first recognized a woman's right to terminate her pregnancy in Roe v. Wade, 410 U.S. at 153, 93 S. Ct. at 727. Roe involved a challenge to a Texas criminal abortion statute that criminalized all abortions except those necessary to preserve the life of the mother. In a plurality opinion, the Court concluded that the constitutional right of privacy encompassed a "woman's decision whether or not to terminate her pregnancy." Id. The Court also recognized that the State has "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life" and that "[a]t some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation . . . ." Id. at 154, 93 S. Ct. at 727. Accordingly, the Court concluded that a woman's right to choose abortion is not absolute and "must be considered against important state interests in regulation." Id.

Reasoning that the State's interests become compelling at certain stages of pregnancy, the Court established a trimester framework by which to review states' abortion regulations in light of the competing interests. Id. at 163-64, 93 S. Ct. at 731-32. According to the Court, medical evidence indicates that before the end of the first trimester, childbirth presents greater risks to a woman's health than does abortion. Id. at 163, 93 S. Ct. at 732. Thus, the Court reasoned that the State's interest in maternal health becomes compelling after the first trimester, when the State may regulate abortion practice in ways reasonably related to protecting maternal health. Id. The Court reasoned further that at viability, the fetus is capable of sustaining life independent of the mother. Id. Accordingly, the Court held that the State's interest in potential

life becomes compelling "at viability." Id. The Court held that the State "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Id. at 163-64, 93 S. Ct. at 732. In Roe, a trimester framework was established pursuant to which the State's interest in maternal health becomes compelling at the end of the first trimester, and the State's interest in potential life becomes compelling at the point of viability. Id. at 163-64, 93 S. Ct. at 731-32.

After Roe, many states, including Tennessee, revised their criminal abortion statutes to account for Roe's trimester framework and a woman's constitutionally protected right to choose abortion. The United States Supreme Court decided several federal constitutional challenges to these newly enacted criminal abortion statutes.

Ten years after Roe, in Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), overruled by Casey, the Court reaffirmed Roe and struck down a second-trimester hospitalization requirement, physician-only informed consent requirements, a twenty-four hour waiting period requirement, a parental consent requirement, and an ordinance dealing with fetal remains. Id. at 452, 103 S. Ct. at 2504. Three members of the Court dissented, urging that the trimester framework of Roe be discarded and that the Court adopt the less restrictive "unduly burdensome" standard. See id. at 461, 103 S. Ct. at 2509 (O'Connor, J. joined by White and Rehnquist, JJ., dissenting).

In Webster v. Reproductive Health Serv., 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), the Court considered the constitutionality of the challenged portions of Missouri's abortion statutes, which provided: 1) that, as a preamble, each human's life begins at conception and that the state's laws should be interpreted to afford unborn children "all the rights, privileges, and immunities available to other persons, citizens, and residents;" 2) that public facilities and employees cannot be used for abortion services; and 3) that physicians conduct viability tests prior to performing abortions.[5] A majority of the Court refused to pass on the constitutionality of the preamble but observed that a State has the authority to make a value judgment favoring childbirth over abortion, and that the "preamble can be read simply to express that sort of value judgment." Id. at 506, 109 S. Ct. at 3050. The majority also upheld the restrictions on the use of public facilities and employees. Id. at 511, 109 S. Ct. at 3053. The constitutionality of viability testing was sustained in an opinion authored by Chief Justice Rehnquist. Id. at 520, 109 S. Ct. at 3058. Justice Blackmun, joined by Justices Brennan and Marshall dissented from the views of the majority. Id. at 539, 109 S. Ct. at 3067 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens dissented in a separate opinion. Id. at 560, 109 S. Ct. at 3079 (Stevens, J., concurring in part and dissenting in part). The dissenting justices, however, concurred in the Court's conclusion that the a provision regarding public funding was moot. Id. at 540, 109 S. Ct. at 3068, n.1 and id. at 560, 109 S. Ct. at 3079.

[5] The Court also considered a ban on the use of public funds to encourage women to have more therapeutic abortions and determined that the issue was moot. Webster, 492 U.S. at 512-13, 109 S. Ct at 3053-54.

Nineteen years after deciding Roe, the Court modified Roe in Planned Parenthood v. Casey. A majority of the Court reaffirmed Roe's holding that the Constitution protects a woman's right to terminate her pregnancy before viability without undue interference from the State. Casey, 505 U.S. at 846, 112 S. Ct. at 2804. After viability, the state has the power to restrict abortions "if the law contains exceptions for pregnancies which endanger the woman's life or health." Id.

Three justices concluded that the "undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." Id. at 876, 112 S. Ct. at 2820 (joint opinion of O'Connor, Kennedy and Souter, JJ.). According to the opinion, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 877, 112 S. Ct. at 2820. The Court upheld informed consent requirements, a twenty-four hour waiting period requirement, a parental consent requirement, a medical emergency exception to protect the mother's life and health, and most record keeping and reporting requirements. Id. at 880, 886-87, 899-901, 112 S. Ct. at 2822, 2825, 2826, 2832-33. It struck down a spousal notification requirement and related record keeping requirements. Id. at 898, 901, 112 S. Ct. at 2831, 2833.

Four justices, concurring in part and dissenting in part, criticized the undue burden test. The justices noted that the undue burden approach has no recognized basis in constitutional law. Id. at 964, 112 S.Ct. at 2866 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in part and dissenting in part). They also observed that the approach "is not built to last." Id. at 965, 112 S. Ct. at 2866. The test is based "on a judge's subjective determinations" and will allow judges to make decisions "guided only by their personal views." Id. They criticized the approach as being no "more workable than the trimester framework it discards." Id. at 966, 112 S. Ct. at 2866.

Most recently, in Stenberg v. Carhart, ___ U.S. ___, 120 S. Ct. 2597, 2617, 147 L.Ed 2d 743 (2000), a majority of the Court reaffirmed the "undue burden" standard. The Court struck down a statute banning partial birth abortions because it had no exception for the health of the mother and applied to dilation and evacuation abortions as well as to dilation and extraction abortions, thereby constituting an undue burden on the woman's ability to choose an abortion.

Although the United States Supreme Court has now replaced the strict scrutiny standard in the abortion context with the less exacting undue burden standard, this action does not determine the standard which this Court must apply under the Tennessee Constitution. We now turn to the issue of the appropriate standard to apply under our state constitution.

2. Tennessee Cases

Though we have never before had the abortion issue squarely before us, we have considered the related issue of procreational autonomy. Davis, 842 S.W.2d at 600. In Davis, we first recognized a right to privacy under the Tennessee Constitution. Id.; see also Hawk, 855 S.W.2d at 577. Davis involved a divorce dispute over the disposition of seven frozen preembryos the parties had created during their marriage. The husband did not want to become a father outside of the marital relationship and therefore wanted the preembryos destroyed. The wife wanted to donate the preembryos to a childless couple. Our analysis of whether the parties would "become parents" turned on the exercise of the parties' constitutional right to privacy.

After observing that the right to privacy is not specifically mentioned in either the federal or the Tennessee constitutions, we initially reviewed the development of the federal right to privacy for guidance in interpreting our state constitution. Davis, 842 S.W.2d at 598-99. We noted that the United States Supreme Court has recognized a federal constitutional right of privacy despite the absence of specific language mentioning such a right in the United States Constitution. We reasoned that, likewise, the "right to privacy, or personal autonomy . . ., while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights . . . ." Id. at 600. We further reasoned that the drafters of the Tennessee Constitution surely "foresaw the need to protect individuals from unwarranted governmental intrusion into matters . . . involving intimate questions of personal and family concern." Id. We thus concluded that the Tennessee Constitution protects the individual's right to privacy and explained that:

> the specific individual freedom in dispute is the right to procreate. In terms of the Tennessee state constitution, we hold that the right of procreation is a vital part of an individual's right to privacy.

Id. (emphasis added). Accordingly, we explicitly relied on the Tennessee Constitution in Davis to extend protection to the husband's right to procreational autonomy.

Since the Davis decision, we have identified privacy rights in other contexts. We have held that a parent's right to the custody of his or her child implicates a fundamental right of privacy and may not be abridged absent a compelling state interest. See Hawk, 855 S.W.2d at 577; Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994); Bond v. McKenzie (In re Adoption of Female Child), 896 S.W.2d 546, 547-48 (Tenn. 1995); Petrosky v. Keene, 898 S.W.2d 726, 728 (Tenn. 1995); Tennessee Baptist Children's Homes, Inc. v. Swanson (In re Brittany Swanson), 2 S.W.3d 180, 187 (Tenn. 1999). The Court of Appeals has relied upon Davis to find a privacy interest in consensual adult homosexuality. See Campbell v. Sundquist, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996). There is no exhaustive list of activities that fall under the

protection of the right to privacy, at either the federal or the state level.[6] However, it is clear that such activities must be of the utmost personal and intimate concern.

We observe that expressly limiting the substantive scope of the interests comprising the right to privacy serves no helpful purpose, is indeed impossible, and is best left to constitutional amendment or interpretation of individual cases. Our task here is to determine whether the interest asserted in this case constitutes a cognizable privacy interest.

We hold that a woman's right to obtain a legal termination of her pregnancy is sufficiently similar in character to those personal and private decisions and activities identified in state and federal precedent to implicate a cognizable privacy interest.

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[6] As regards the federal level, the United States Supreme Court has afforded privacy protection to matters of marriage. See Zablocki v. Redhail, 434 U.S. 374, 383-86, 98 S.Ct. 673, 679-681, 54 L.Ed2d 618 (1978) (identifying right to marry as protected by right to privacy); Boddie v. Connecticut, 401 U.S. 371, 383, 91 S.Ct. 780, 789, 28 L.Ed.2d 113 (1971) (holding court may not deny dissolution of marriage to indigents solely based on failure to pay filing fees); Loving v. Virginia, 388 U.S. 1, 11-12, 87 S.Ct. 1817, 1823-24, 18 L.Ed.2d 1010 (1967) (invalidating statute prohibiting interracial marriage); Griswold v. Connecticut, 381 U.S. 479, 485-86, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965) (finding law prohibiting use of contraceptives to violate right of marital privacy).

Individual choices regarding family and child rearing also fall under the right to privacy. See Moore v. City of E. Cleveland, 431 U.S. 494, 506, 97 S.Ct. 1932, 1939, 52 L.Ed.2d 531 (1977) (plurality opinion) (invalidating zoning ordinance that essentially prohibited living with extended family); Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925) (invalidating law requiring children to attend public schools instead of, as parents wished, private school); Meyer v. Nebraska, 262 U.S. 390, 403, 43 S.Ct. 625, 628, 67 L.Ed. 1042 (1923) (invalidating law which prohibited the teaching of foreign languages to children in spite of parents wishes).

Matters regarding procreation implicate the right to privacy. See Carey v. Population Servs. Int'l, 431 U.S. 678, 690-91, 97 S.Ct. 2010, 2018-19, 52 L.Ed.2d 675 (1977) (invalidating statute prohibiting sale of nonmedical contraceptives by non-pharmacists); Roe v. Wade, 410 U.S. at 164, 93 S.Ct. at 732 (1973) (invalidating laws prohibiting abortion); Eisenstadt v. Baird, 405 U.S. 438, 454-55, 92 S.Ct. 1029, 1039, 31 L.Ed.2d 349 (1972) (invalidating laws prohibiting sale of contraceptives to unmarried persons); Griswold v. Connecticut, 381 U.S. at 485-86, 85 S.Ct. at 1682 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (invalidating mandatory sterilization plan of certain convicted felons).

Also, to some degree, matters regarding bodily integrity and personal autonomy implicate privacy interests. See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71, 96 S.Ct. 2831, 2842, 49 L.Ed.2d 788 (1976) (invalidating spousal consent provision of abortion statutes stating, "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the [woman and her husband], the balance weighs in her favor."); cf. Rochin v. California, 342 U.S. 165, 174, 72 S.Ct. 205, 210-211, 96 L.Ed. 183 (1952) (finding due process violation from law enforcement's invasion of a defendant's body to obtain inculpatory evidence).

3. Protections Afforded the Right to Privacy

Determining whether an asserted interest is fundamental is essential because fundamental rights receive special protection under both federal and state constitutions. Federal case law uniformly holds the government regulation of the exercise of fundamental rights is unconstitutional unless the regulations both serve a compelling governmental interest and are narrowly tailored to serve that interest. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29, 93 S. Ct. 1278, 1294, 36 L.Ed.2d 16 (1973). Tennessee courts have adopted this "strict scrutiny" approach in regard to fundamental rights without exception. See State v. Smoky Mountain Secrets, Inc., 937 S.W.2d 905, 911 (Tenn. 1996).

Under federal law, privacy interests involving matters of marriage, procreation, and child rearing have been held to be "fundamental" in nature. Fundamental rights have been described as "those liberties that are 'deeply rooted in this Nation's history and tradition.'" Bowers v. Hardwick, 478 U.S. 186, 192, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986) (quoting Moore v. City of E. Cleveland, 431 U.S. at 503, 97 S.Ct. at 1938). They have also been described as those rights that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" Bowers, 478 U.S. at 191-92, 106 S.Ct. at 2844 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26, 58 S.Ct. 149, 152, 82 L.Ed.2d 288 (1937), overruled by Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969); accord Roe, 410 U.S. at 152, 93 S.Ct. at 726. Additionally, fundamental rights have been found to be those rights "explicitly or implicitly guaranteed by the Constitution." Rodriguez, 411 U.S. at 33-34, 93 S.Ct. at 1297 (context of equal protection challenge).

Nevertheless, in Davis, we found the right to procreational autonomy to be "inherent in our most basic concepts of liberty." Davis, 842 S.W.2d at 601. That test was essentially a restatement of the fundamental rights approach of Roe. Because a woman's right to terminate her pregnancy and an individual's right to procreational autonomy are similar in nature, we find the Davis test to be most appropriate here.[7] Thus, a woman's right to terminate her pregnancy is fundamental if it can be said to be inherent in the concept of ordered liberty embodied in the Tennessee Constitution.

The dissent contends that the right to terminate a pregnancy as guaranteed by the Tennessee Constitution is co-extensive with the similar right as guaranteed by the United States Constitution, and this Court should follow the pronouncement of the United States Supreme Court as to the appropriate standard on which to judge abortion regulations. See Casey, 505 U.S. at 876, 112 S. Ct. at 2820. The dissent's primary contention in this regard is that the historical backgrounds of the federal due process clauses and the "Law of the Land" clause in the Tennessee Constitution (Tenn. Const. art. I, § 8) are similar and that the textual differences of the clauses should be accorded little weight. The dissent also contends that historically the

[7] Our holding does no violence to previous Tennessee privacy cases that have applied different tests for determining whether a privacy interest rose to the level of a fundamental right. Different tests may be warranted in different contexts.

courts of this State have consistently viewed the "Law of the Land" clause as providing co-extensive protection to personal liberty as that provided by the federal due process clauses.

Without question, the protections afforded Tennessee citizens by the Tennessee Constitution's Declaration of Rights share the contours of the protections afforded by the United States Constitution's Bill of Rights. See Davis, 842 S.W.2d at 600. This is due, in large part, to affinity of purpose. Both documents were written with the intent to reserve to the people various liberties and to protect the free exercise of those liberties from governmental intrusion.

It is also due in part to the Supremacy Clause of the United States Constitution, which provides that the federal constitution is the ultimate "Law of the Land." See U.S. Const. art. VI, cl. 2. It essentially mandates that no Tennessee law, whether statute, rule, or constitution, may operate to deprive a Tennessean any right afforded by the federal constitution. See Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1979).

Therefore, Tennessee courts are rightfully reluctant to find greater protection from the text of the state constitution where the protections of the federal constitution suffice. As a result, more interpretive case law is generated in regard to the federal constitution. See Richard S. Wirtz, Foreward: Interpreting the Tennessee Constitution, 61 Tenn. L. Rev. 405, 406 (1994). Therefore, analysis of case law interpreting the federal constitution is often a first step in interpreting provisions of our own constitution that are similar in wording, intent, or purpose.

It is equally without question, however, that the provisions of our Tennessee Declaration of Rights from which the right to privacy emanates differ from the federal Bill of Rights in marked respects. In Davis, we found that the right to privacy guaranteed by the Tennessee Constitution sprang from the express grants of rights in Article I, sections 3, 7, 19, and 27, and also from the grants of liberty in Article I, sections 1, 2, and 8. See Davis, 842 S.W.2d at 599-600.

These protections contained in our Declaration of Rights are more particularly stated than those stated in the federal Bill of Rights. For example, the explicit guarantee of freedom of worship found under the United States Constitution occupies but sixteen words in an amendment generally guaranteeing freedom of worship, freedom of speech, freedom of the press, the right to assemble, and the right to petition the government for redress of grievances. See U.S. Const. amend. I.

In contrast, the guarantee of worship under the Tennessee Constitution exists in its own paragraph constituting eighty-one words. It characterizes mankind's right to worship as "a natural and indefeasible right" and declares "that no human authority can, in any case whatever, control or interfere with the rights of conscience." Tenn. Const. art I, § 3. This Court has said that the language of this section, when compared to the guarantee of religious freedom contained in the federal constitution, is a stronger guarantee of religious freedom. See Carden v. Bland, 288 S.W.2d 718, 721 (Tenn. 1956).

Tennessee's guarantees of free speech and free press are similarly more descriptive than the federal grant. The verbal expression of these basic freedoms in our constitution is infused with a strong sense of individuality and personal liberty: "The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tenn. Const. art. I, § 19.

While these differences in language and expression have yet to give rise to recognition of a substantial difference in protection of speech, this Court has not foreclosed the possibility that our constitution might offer greater protection to speech in certain contexts. See, e.g., Davis-Kidd Booksellers, 866 S.W.2d at 525 (noting finding coextensive protection in obscenity context does not mean provisions are "identical" for all purposes); Leech v. American Booksellers Ass'n, Inc., 582 S.W.2d 738, 745 (Tenn. 1979) (holding Art. I, § 19 "should be construed to have a scope at least as broad as that afforded those freedoms by the first amendment of the United States Constitution" (emphasis added)). That this Court has seen fit to leave this door open speaks of our recognition of a potentially greater state protection.

Some of our constitutional protections have been found to be "identical" to provisions of the United States Constitution in some respects. For example, this Court held in Sneed v. State, 423 S.W.2d 857 (Tenn. 1968) that the Tennessee constitutional prohibition against unreasonable searches and seizures "is identical in intent and purpose" to the Fourth Amendment of the federal constitution. Id. at 860.

Identity in intent and purpose, however, does not necessarily correlate to coextensive degrees of protection. In fact, this Court's "decisions applying the state constitution have been somewhat more restrictive than comparable federal cases" in some search and seizure contexts. State v. Lakin, 588 S.W.2d 544, 548 (Tenn. 1979) (finding Tenn. Const. art. I, § 7 offered greater protection than U.S. Const. amend. IV in context of "open fields doctrine"); see also State v. Doelman, 620 S.W.2d 96, 99 (Tenn. Crim. App. 1981) (noting "the Tennessee Constitution is somewhat more protective of private property rights").

This difference in degree of protection afforded by the state and federal constitutions was due primarily to an explicit difference in wording between the two constitutional provisions. Article I, section 7 of the Tennessee Constitution protects "possessions," a term not mentioned in the Fourth Amendment to the United States Constitution. See Lakin, 588 S.W.2d at 549 (construing protection of "possessions" to include occupied, fenced areas); see also Welch v. State, 154 Tenn. 60, 64, 289 S.W. 510, 511 (1926).

We do not mean to suggest a qualitative difference in constitutional provisions simply because of a mere quantitative difference in words. Nor do we suggest that different expressions of intent preclude that intent being identical. Cf. Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979) (stating, "We do not agree that the Tennessee prohibition against self-incrimination is broader or different in any application thereof because of the use of the word 'evidence' instead of the word 'witness'").

Still, this Court is not free to discount the fact that the framers of our state constitution used language different from that used by the framers of the United States Constitution. No words in our constitution can properly be said to be surplusage, see Welch, 154 Tenn. at 62, 289 S.W. at 510 ("[T]he word 'possessions' was added [to our Constitution] for a purpose."), and differences in expressions of right are particularly relevant to determining the "concept of liberty" embodied in our constitution.

Our constitution also contains specific provisions not found in the federal constitution, the most pertinent being Article 1, section 2, condemning the doctrine of nonresistence. This provision exemplifies the strong and unique concept of liberty embodied in our constitution in that it "clearly assert[s] the right of revolution." Otis H. Stephens, Jr., The Tennessee Constitution and the Dynamics of American Federalism, 61 Tenn. L. Rev. 707, 710 (1994). It provides: "That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." Tenn. Const. art. I, § 2. In essence, this section recognizes that our government serves at the will of the people of Tennessee, and expressly advocates active resistence against the government when government no longer functions to serve the people's needs. There is no better statement of our constitution's concept of liberty than this audacious empowerment of Tennesseans to forcibly dissolve the very government established but one Article later in our constitution.

That the protections afforded by some of these express provisions, including the "Law of the Land" clause, have been found to be "practically synonymous" with their federal counterparts is not dispositive of the issue of whether the collective concept of liberty embodied in our constitution is greater than the concept envisioned by the federal constitution. Indeed, this Court has recognized that practical synonymity does not necessarily correspond to coextensive expressions of liberty, even as to individual express guarantees under the constitution. For example, in Carden v. Bland, 199 Tenn. at 672, 288 S.W.2d at 721, we held that the freedom of worship clauses in the Tennessee and federal Constitutions are "practically synonymous." Still, in that same breath, the Court noted, "If anything, our own organic law is broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience . . . ." Id.

Today, we remain opposed to any assertion that previous decisions suggesting that synonymity or identity of portions of our constitution and the federal constitution requires this Court to interpret our constitution as coextensive to the United States Constitution.[8] "Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and do not relegate Tennessee citizens to the lowest levels of constitutional

[8] The dissent misinterprets our holding in this regard. It states that "the Court has even declared today that it 'remains opposed' to any assertion that prior cases interpreting our constitution should control the outcome of this case." We do not suggest that precedent has no value in interpreting our constitution. The fact, however, that previous decisions have held that our constitutional provisions are synonymous with their federal counterparts does not mean that we are not free to interpret the provisions of our constitution with respect to a particular right in such a way as to give stronger protection to individual liberties.

protection, those guaranteed by the national constitution." State v. Black, 815 S.W.2d 166, 193 (Tenn. 1991) (Reid, C.J., concurring in part and dissenting in part). We have said time and again that:

> [A]s to Tennessee's Constitution, we sit as a court of last resort, subject solely to the qualification that we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution. It is settled law that the Supreme Court of a state has full and final power to determine the constitutionality of a state statute, procedure, or course of conduct with regard to the state constitution, and this is true even where the state and federal constitutions contain similar or identical provisions.

Miller v. State, 584 S.W.2d at 760 (emphasis added). We do not intend to divert from this principle.

The concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental. The provisions of the Tennessee Constitution imply protection of an individual's right to make inherently personal decisions, and to act on those decisions, without government interference. A woman's termination of her pregnancy is just such an inherently intimate and personal enterprise. This privacy interest is closely aligned with matters of marriage, child rearing, and other procreational interests that have previously been held to be fundamental. To distinguish it as somehow non-fundamental would require this Court to ignore the obvious corollary.

4. The Appropriate Standard

It is well settled that where a fundamental right is at issue, in order for a state regulation which interferes with that right to be upheld, the regulation must withstand strict scrutiny. The State's interest must be sufficiently compelling in order to overcome the fundamental nature of the right. See State v. Smoky Mountain Secrets, 937 S.W.2d at 910-11; Hawk 855 S.W.2d at 579 n.9 (citing Davis for the proposition that the state's interest must be sufficiently compelling to overcome a fundamental right, Davis, 842 S.W.2d at 602.). See also Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969 (Alaska 1997); American Academy of Pediatrics v. Lungren, 66 Cal. Rptr. 2d 210, 231, 16 Cal. 4th 307, 340-41, 940 P.2d 797, 819 (1997) (plurality opinion); Women of the State of Minn. v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995); Florida v. Presidential Women's Ctr., 707 So.2d 1145, 1149 (Fla. Dist. Ct. App. 1998).

Other jurisdictions have applied heightened scrutiny of governmental regulation of abortion since Casey was decided. Our rejection of the Casey standard is similar to the action

taken by those state courts. In Women of the State of Minn. v. Gomez, the Minnesota Supreme Court considered a complaint for declaratory and injunctive relief challenging the constitutionality of statutes restricting the use of public medical assistance and general assistance funds for abortions. The Court determined that the Minnesota Constitution guaranteed a right of privacy rooted in several provisions of the constitution, including a due process provision, a "law of the land" provision, and a provision protecting against unreasonable searches and seizures. Gomez, 542 N.W.2d at 27 n.10. The Court held that the right of privacy includes a woman's right to choose to have an abortion. Id. at 27. Stating that it could think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion, it held that the case was one of those limited circumstances in which it would interpret the Minnesota Constitution to provide more protection than that afforded under the federal constitution. Id. at 27, 30. It subjected the regulations to strict scrutiny because the right of privacy is fundamental. Id. at 31. See also Planned Parenthood League of Massachusetts, Inc. v. Attorney General, 424 Mass. 586, 590, 677 N.E.2d 101, 104 (1997) (holding that the state constitution Declaration of Rights afforded greater degree of protection to the right asserted than did the federal constitution as interpreted by the United States Supreme Court).

The application of the strict scrutiny approach is entirely consistent with our jurisprudence considering laws which impose upon or restrict fundamental rights. While the joint opinion in Casey adopted the "undue burden" approach, Justice Scalia in a separate dissent and concurrence criticized the so-called standard as being "ultimately standardless." 505 U.S. at 987, 112 S. Ct. at 2878 (Scalia, J. dissenting and concurring). He noted that the undue burden standard was "created largely out of whole cloth" and essentially had no recognized basis in constitutional law. Id. (referring to Rehnquist, C.J. concurring and dissenting, Id. at 964, 112 S. Ct. at 2866.)

We agree that the undue burden approach is essentially no standard at all, and, in effect, allows judges to impose their own subjective views of the propriety of the legislation in question. The dissent has criticized the majority for "convert[ing] itself into a roving constitutional convention which is free to strike down the duly enacted laws of the legislature for no other reason than the Court feels they are burdensome and unwise." In fact, that is exactly what the undue burden approach allows. Under that test, the Court is free to determine, under the justices' own subjective opinions as to the wisdom of the legislation, whether the legislation creates an undue burden upon a woman's right to terminate her pregnancy. Application of strict scrutiny, a recognized principle of constitutional law, on the other hand, requires the Court to apply a standard that has been applied repeatedly over the years, and the Court may draw upon that precedent in determining whether the legislation passes muster.

The subjective nature of the undue burden analysis is aptly illustrated by the fact that the majority and the dissent reach diametrically opposed results when applying the analysis. The majority would find each of the challenged abortion statutes to be unconstitutional under Casey,

while the dissent, applying exactly the same analysis, would reach the opposite result as to each statute, save one. [9]

The undue burden test requires a judge to consider only the effect of the governmental regulation. It fails, however, to offer an objective standard by which the effect should be judged. Accordingly, a regulation held to be an undue burden by one judge could just as easily be found to be reasonable by another judge because the gauge for what is an undue burden necessarily varies from person to person.

Thus, the Casey test offers our judges no real guidance and engenders no expectation among the citizenry that governmental regulation of abortion will be objective, evenhanded, or well-reasoned. This Court finds no justification for exchanging the long established constitutional doctrine of strict scrutiny for a test, not yet ten years old and applicable to a single, narrow area of the law, that would relegate a fundamental right of the citizens of Tennessee to the personal caprice of an individual judge.

It may be appropriate in some areas of our law to provide judges individual, and necessarily subjective, discretion. Subjective judicial opinion has no place, however, in determining the constitutionality of the exercise of fundamental rights. Accordingly, we conclude that strict scrutiny is the appropriate standard to apply in this case.

5. Application of Strict Scrutiny

The next critical inquiry in our review is the nature of the State's interests and when each of the respective interests becomes compelling. In our view, the State has an interest in promoting the health and safety of all its citizens, and the State clearly has a compelling interest in maternal health from the beginning of pregnancy. Tenn. Const. art. I, § 1 (stating that the government is "instituted for [the] peace, safety and happiness" of its citizens); but see Roe, 410 U.S. at 163, 93 S. Ct. at 731 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester.").

In Davis, we discussed the State's interest in potential life. There, we were concerned with the State's interest in the potential life of the four- to eight-cell preembryos, and we ultimately concluded that the State's interest in potential life was insufficient to permit an infringement on the parties' procreational autonomy. Davis, 842 S.W.2d at 602. We reviewed

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[9] The dissent criticizes this Court's "undue burden" analysis by stating that the Court has cited no legal authority or analysis in reaching the conclusion that the challenged regulations are unconstitutional under the "undue burden" test. However, we have indeed conducted an analysis focusing upon whether the effect of the regulation creates an undue burden upon the person seeking an abortion. Moreover, the only "legal authority" which need be cited is the Casey opinion since it presumably sets forth the standard and the analysis which must be followed if the "undue burden" test is followed.

our state statutes which deal with potential human life and noted that Tenn. Code Ann. § 20-5-106(b) (1980) allowed a civil action for wrongful death of a viable fetus. Davis, 842 S.W.2d at 602 n.26 (emphasis added). We further noted that pursuant to Tenn. Code Ann. §§ 39-13-107 and -214 (1991), a person cannot commit a criminal offense against a fetus unless the fetus is viable. Id. Finally, we reviewed the trimester framework of our criminal abortion statutes. We reasoned that:

> Taken collectively, our statutes reflect the policy decision that, at least in some circumstances, the interest of living individuals in avoiding procreation is sufficient to justify taking steps to terminate the procreational process, despite the state's interest in potential life.

Id. We thus concluded that the State's interest in the four- to eight-cell preembryos was "at best slight" and indicated that viability marks a critical developmental point in a woman's pregnancy. Id. at 602, 602 n.26.

We further noted in Davis that the "abortion statute reveals that the increase in the state's interest is marked by each successive developmental stage . . . ." Id. at 602. It follows that as the pregnancy progresses, the State's interest in potential life gradually increases and gradually comes into conflict with the woman's interest in procreational autonomy. In our view, therefore, it is clear that at some developmental point in the woman's pregnancy, the State's interest in potential life becomes compelling, and the woman's interest in procreational autonomy must yield to the State's interest. See id. at 602 n.26; Tenn. Code Ann. § 20-5-106(c) (Supp. 1999); Tenn. Code Ann. §§ 39-13-107 and -214 (1997). Accordingly, we hold that the State's interest in potential life becomes compelling at viability. Bearing these constitutional standards in mind, we now consider the challenged provisions.

C. Analysis of Tennessee's Criminal Abortion Statutes

1. Tenn. Code Ann. § 39-15-201

The Tennessee statute initially provides that abortions are lawful within the first three months of pregnancy if performed with the woman's consent and in accordance with the medical judgment of her attending physician. Tennessee Code Ann. § 39-15-201(c)(2) further provides that "[n]o person is guilty of a criminal abortion . . . when an abortion . . . is performed under the following circumstances:

. . . .

> After three (3) months, but before viability of the fetus, if the abortion or attempt to procure a miscarriage is performed with the pregnant woman's consent and in a hospital . . . .

Tenn. Code Ann. § 39-15-201(c)(2). There is no statutory provision for a medical emergency exception to the second trimester hospitalization requirement. See Tenn. Code Ann. §§ 39-15-201 through 209.

The trial court construed the term "hospital" to include "ambulatory surgical centers," bringing the statute into conformity with the standards of the American College of Obstetricians and Gynecologists, and upheld the second trimester hospitalization requirement. The Court of Appeals applied the undue burden standard and concluded that there was no evidence of improper legislative motive nor evidence that the second trimester hospitalization requirement created a substantial obstacle preventing women from obtaining abortions.

Under the strict scrutiny standard, it is the State's burden to show that the regulation is justified by a compelling state interest and narrowly tailored to achieve that interest. E.g., Smoky Mountain Secrets, 937 S.W.2d at 912; Hawk, 855 S.W.2d at 579 n.9. The State concedes that the hospitalization requirement increases the cost of abortions. The State, however, points to evidence in the record that second trimester abortions can result in complications and argues that such complications require a hospital setting for a proper medical response. The State presented testimony that Planned Parenthood's facilities lack necessary instruments, equipment, and supplies to perform abortions after the third month of pregnancy. In light of this evidence, the State argues that the second trimester hospitalization requirement is necessary to protect maternal health. Planned Parenthood points to evidence that second trimester abortions are safe outside the hospital setting up to eighteen weeks of pregnancy and that the hospitalization requirement only serves to increase the cost of second trimester abortions without increasing their safety. The State insists, however, that freestanding outpatient clinics and ambulatory treatment centers like those run by the plaintiffs lack adequate facilities in which to perform second trimester abortions.

Although the State has a compelling interest in maternal health from the beginning of pregnancy, Tenn. Const. art. I, § 1, the second trimester hospitalization requirement is not narrowly tailored to further that state interest. Substantial evidence was introduced at trial to indicate that abortions can be performed safely outside the hospital setting through at least the first eighteen weeks of pregnancy. American College of Obstetricians and Gynecologists, Standards for Obstetric-Gynecologic Services (7th ed. 1989). As observed by the Court of Appeals, a general agreement exists within the medical community that abortions can be performed safely in physicians' offices and outpatient clinics through the fourteenth week of pregnancy and, further, that physicians agree that abortions through the eighteenth week of pregnancy may be performed safely in free-standing surgical facilities. As noted by the trial court, the evidence is clear that second-trimester abortions are performed in the Nashville community in "'ambulatory surgical centers,' which have resulted from advanced medical technology and care, and are also the product of an attempt to lower costs to patients."

The State may, of course, adopt standards for licensing facilities where second trimester abortions may be performed such as requiring facilities to be properly equipped and staffed. See, e.g., American College of Obstetricians and Gynecologists, Standards for Obstetric-

Gynecologic Services (setting forth suggested qualification standards). However, the State may not simply prohibit all second trimester abortions that are not performed in a hospital. Such a regulation is not narrowly tailored to promote maternal health.

Moreover, in light of the complete absence of a medical emergency exception to the hospitalization requirement, the provision is constitutionally infirm even under the federal undue burden standard. Casey, 505 U.S. at 879, 112 S. Ct. at 2821 ("[T]he state . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (quoting Roe, 410 U.S. at 164-65, 93 S. Ct. at 732) (emphasis added)). Accordingly, we conclude that the second trimester hospitalization requirement "place[s] a substantial obstacle in the path of a woman seeking an abortion." Id. at 878, 112 S. Ct. at 2821.

2. Tenn. Code Ann. § 39-15-202

We now turn to consider the statutory provisions that set out the informed consent requirements, the two-day waiting period requirement, and the medical emergency exceptions to each of these requirements. Because each of these provisions are interrelated, and the lower courts considered the combined effect of these subsections, we too will consider them together.

The informed consent requirements are codified at Tenn. Code Ann. § 39-15-202(b)-(c). Subsection 202(b) states:

> (b) In order to ensure that a consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she has been orally informed by her attending physician of the following facts and has signed a consent form acknowledging that she has been informed as follows:
>
> (1) That according to the best judgment of her attending physician she is pregnant;
>
> (2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history, physical examination, and appropriate laboratory tests;
>
> (3) That if more than twenty-four (24) weeks have elapsed from the time of conception, her child may be viable, that is, capable of surviving outside of the womb, and that if such child is prematurely born alive in the course of an abortion her attending physician has a legal obligation to take steps to preserve the life and health of the child.

. . .

> (5) That numerous public and private agencies and services are available to assist her during her pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place the child for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests; or
>
> (6) Numerous benefits and risks are attendant either to continued pregnancy and childbirth or to abortion depending upon the circumstances in which the patient might find herself. The physician shall explain these benefits and risks to the best of such physician's ability and knowledge of the circumstances involved.

Subsection 202(c) states:

> At the same time the attending physician provides the information required by subsection (b), such physician shall inform the pregnant woman of the particular risks associated with her pregnancy and childbirth and the abortion or child delivery technique to be employed, including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion or childbirth in order to ensure her safe recovery.

Id. § 202(b)-(c).[10] These provisions apply to any abortion sought in Tennessee, regardless of the trimester in which it is sought.

The two-day waiting period requirement is codified at Tenn. Code Ann. § 39-15-202(d)(1). This subsection states:

> There shall be a two-day waiting period after the physician provides the required information, excluding the day on which such information was given. On the third day following the day such information was given, the patient may return to the physician and sign a consent form.

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[10] The lower courts held unconstitutional § 202(b)(4), the informed consent subsection requiring physicians to inform patients that "abortion in a considerable number of cases constitutes a major surgical procedure." The State has not appealed that holding, and that subsection is not before us.

Id. § 202(d)(1). Thus, after the woman receives the mandated information, she must wait two additional days before she "may return" to the physician, sign a consent form, and obtain the abortion.

Finally, the emergency medical exceptions to both these sections are codified at Tenn. Code Ann. § 39-15-202(d)(3), (g). Subsection 202(d)(3) provides the medical emergency exception to the two-day waiting period requirement and states:

> This subsection shall not apply when the attending physician, utilizing experience, judgment or professional competence, determines that a two-day waiting period or any waiting period would endanger the life of the pregnant women. . . . This provision shall not relieve the attending physician of his duty to the pregnant woman to inform her of the facts under subsection (b).

Id. § 202(d)(3) (emphasis added). Subsection 202(g) contains the medical emergency exceptions to all requirements of Tenn. Code Ann. § 39-15-202 and states:

> The provisions of this section shall not apply in those situations where an abortion is certified by a licensed physician as necessary to preserve the life of the pregnant woman.

Id. § 202(g) (emphasis added). These are the only medical emergency exceptions to the challenged statutory provisions before this Court.

The trial court found that the attending physician need not personally inform the pregnant woman of the required information, but must verify that such counseling has taken place and confirm that the patient is "actually supplied adequate information to enable her to make an autonomous decision." The trial court, however, struck the waiting period requirement. Finally, as to the medical emergency exceptions, the trial court interpreted the word "life" to mean "life and health" and upheld the exceptions.

Although the Court of Appeals generally affirmed the trial court with regard to the informed consent provisions, the appellate court disagreed with the trial court's conclusion that the waiting period created an undue burden. The intermediate court expressed concern that its research had failed to reveal a single case upholding a waiting period longer than twenty-four hours, but the court declined to strike the statute based solely on the length of the waiting period. The Court of Appeals did conclude, however, that under the facts of this case, the combined effect of the physician-only counseling requirement and the mandatory two-day waiting period unduly burdens a woman's exercise of her procreational rights. The court disagreed with the trial court's analysis concerning the attending physician requirement, stating that pursuant to the plain language of the statute, a physician may not delegate his or her informed consent obligations to any other person. Finally, the court disagreed with the trial court's construction of

the medical emergency exception contained in Tenn. Code Ann. § 39-15-202(g), reasoning that pursuant to the plain meaning of § 202(g), a physician may bypass the requirements of Tenn. Code Ann. § 39-15-202 only when "necessary to preserve the life of the pregnant woman," regardless of her health. Accordingly, the appellate court held the medical emergency exceptions to be unconstitutional under Casey.

It is the State's burden to show that the regulation is justified by a compelling state interest. E.g., Smoky Mountain Secrets, 937 S.W.2d at 912; Hawk, 855 S.W.2d at 579 n.9. The State, however, has chosen to primarily argue that the Court of Appeals was correct in reviewing the challenged provisions under the undue burden standard announced in Casey. Planned Parenthood, on the other hand, argues that none of these provisions are narrowly tailored to further compelling state interests.

a. Informed Consent and Physician-Only Counseling Requirements

Planned Parenthood challenged the statutory requirement that before a woman consents to an abortion, her attending physician must orally inform her of certain information about the procedure and her options. Tenn. Code Ann. § 39-15-202(b) and (c). The legislature has spoken on the issue of informed consent in another context. Tenn. Code Ann. § 29-26-118. This section applies to all other actions involving the issue of informed consent except for abortion. Section 29-26-118, captioned "Proving inadequacy of consent," provides that a plaintiff to a malpractice action proves lack of informed consent by presenting evidence that the physician "did not supply appropriate information to the patient in obtaining his informed consent . . . in accordance with the recognized standard of acceptable professional practice in the profession and in the speciality, if any . . ." Id. The legislature has provided for a cause of action based on the lack of informed consent and has recognized that infomed consent is intended to benefit the patient, i.e., the pregnant woman. Accord, e.g., Bryant v. HCA Health Services of Tennessee, Inc., 15 S.W.3d 804, 809-10 (Tenn. 2000).

Although it is important that a woman contemplating abortion be informed "in accordance with the recognized standard of acceptable professional practice," the physician-only counseling requirement is not narrowly tailored to accomplish this requirement. The State argues that medical ethics require the attending physician to impart the required information to the woman. The State suggests that nothing in the statute prevents the attending physician from informing the woman of the required information over the telephone, thereby reducing any burden which could result from the combined effect of the physician-only counseling requirement and the two-day waiting period requirement. In our view, however, this interpretation disregards the plain language contained in Tenn. Code Ann. § 39-15-202(d)(1) that a woman "may return" to the physician's office following the two-day waiting period. In requiring that a woman wait two days before she "may return" to her physician, id., the legislature clearly intended that the woman make two trips to the physician in order to fulfill the informed consent requirements.

In any event, the State maintains that these provisions are constitutionally sound, pointing to evidence in the record that Planned Parenthood has been providing similar information to its patients. Medical experts for Planned Parenthood testified that most women have already made up their minds before going to the abortion provider, and for those who seem uncertain upon arrival, that doctors either discuss the matter further or will not perform the abortion. Moreover, evidence indicates that it is standard throughout the medical community for health care professionals other than the attending physician to provide needed counseling and that the attending physician's role should be to ensure that the patient has received appropriate information. See also Akron, 462 U.S. at 448, 103 S. Ct. at 2502 ("The State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it."). Because it is not necessary that the physician personally impart the required information to the woman in order for informed consent to occur, the physician-only counseling requirement is not narrowly tailored to further a compelling state interest and will not be upheld.

We likewise conclude that the physician-only counseling requirement cannot be upheld, even under the less exacting undue burden analysis. Because the information may be provided to the woman contemplating abortion by another health care professional and the same result be achieved, we can only conclude that the purpose or effect of the physician-only requirement is to "place a substantial obstacle in the path of a woman seeking an abortion." Casey, 505 U.S. at 878, 112 S. Ct. at 2821.

Our analysis of the physician-only counseling requirement, as well as the lower court's conclusion and the State's concession that § 39-15-202(b)(4) ("[t]hat abortion in a considerable number of cases constitutes a major surgical procedure") is unconstitutional, pretermits our discussion of each of the informed consent provisions individually. We decline to simply elide those portions of subsections (b) and (c) relating to the specific information the woman is to be told. See State ex rel. Barker v. Harmon, 882 S.W.2d 352, 353 (Tenn. 1994). In Harmon, we explained that "[t]he doctrine of elision allows a court, under appropriate circumstances when consistent with the expressed legislative intent, to elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." Id. at 355. Even though the General Assembly included a severability clause when the statutes were recodified in 1989, 1989 Tenn. Pub. Acts, ch. 591, § 120, the State's arguments have not only stressed the importance of having the physician personally inform the woman but have further insisted that medical ethics require the physician to inform the woman. Accordingly, we conclude that the legislature would not have enacted the informed consent provisions in absence of the physician-only counseling requirement, and that consequently, the doctrine of elision cannot apply to save the remaining informed consent provisions.[11]

[11] We observe, however, that some of the provisions are narrowly tailored to further the State's interest in maternal health, such as the requirement that the woman be told she is pregnant and the probable gestational age of the fetus. Planned Parenthood tacitly concedes this point.

b. Mandatory Waiting Period Requirement

We further conclude that the two-day waiting period requirement contained in Tenn. Code Ann. § 39-15-202(d)(1) fails to pass constitutional muster. The State appears to argue that the waiting period requirement furthers its interest in potential life and explicitly argues that this provision protects maternal health by ensuring that the woman has adequate time to reflect on her decision after hearing the statutorily prescribed information. The State has not argued that the waiting period provision is narrowly tailored to further a compelling state interest, but instead points to evidence that while the waiting period was in effect, the District Court for the Western District of Tennessee made a finding of fact that over 3,000 abortions were performed during the year preceding the hearing in the case, see Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn. March 23, 1981), p. 7, and that, consequently, this requirement does not create an undue burden.[12]

In Akron, the United States Supreme Court struck down a twenty-four hour waiting period, reasoning that "careful consideration of the abortion decision by the woman 'is beyond the state's power to require.'" 462 U.S. at 450, 103 S. Ct. at 2503 (citation omitted). The Court characterized the twenty-four hour waiting period as "arbitrary and inflexible" and reasoned that the city had failed to show that the requirement increased the safety of abortion or otherwise furthered a legitimate state interest. Id. The Court concluded:

> The decision whether to proceed with an abortion is one as to which it is important to "affor[d] the physician adequate discretion in the exercise of his medical judgment." In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her. But if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision.

Id. at 450-51, 103 S. Ct. at 2503 (emphasis added) (citation omitted) (footnote omitted). Although later the authors of the Casey opinion determined that a 24-hour waiting period did not violate the "undue burden" standard, 505 U.S. at 887, 112 S. Ct. at 2826, the reasoning of the

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[12] Although we did not grant permission to appeal the issue, defendants also argue that Planned Parenthood is collaterally estopped from challenging the two-day waiting period requirement because of dicta contained in Planned Parenthood of Memphis v. Alexander In holding that the waiting period was unconstitutional under the strict scrutiny standard, Judge Wellford commented that he was not persuaded that the waiting period constitutes an undue burden. Even assuming that the parties to the Alexander case are the same parties in the present controversy, and assuming that the parties had a full and fair opportunity to present their positions in the earlier case, the two cases involve different issues. The issue before this Court is whether the waiting period furthers a compelling state interest under the Tennessee Constitution, and we are the final arbiters of such a question. Accordingly, in our view, the defendants' collateral estoppel argument is without merit.

Supreme Court in Akron is equally applicable to the challenge made here under the Tennessee Constitution. As the trial court stated,

> a woman contemplating an abortion should be allowed "sufficient time for reflection" before she makes an informed decision. However, a "sufficient amount of time" varies with each individual woman, and the inflexibility of a two-day waiting period as it applies to every woman except in a medical emergency situation requires its invalidation. The majority of the expert testimony seemed to acquiesce in the fact that most women have seriously contemplated their decision before making their appointment . . .; several of the witnesses testified that many of the patients at Planned Parenthood were referred by other private physicians, indicating that the woman already has at the very least a basic understanding of her situation and the decisions now before her. To mandate that she wait even longer insults the intelligence and decision-making capabilities of a woman . . . .

Evidence in the record indicates that patient mortality rates for abortions increase as the length of pregnancy increases. Studies also suggest that a large majority of women who have endured waiting periods prior to obtaining an abortion have suffered increased stress, nausea and physical discomfort, but very few have reported any benefit from having to wait. Moreover, evidence in the record indicates that the waiting period increases a woman's financial and psychological burdens, since many women must travel long distances and be absent from work to obtain an abortion. Planned Parenthood presents a compelling argument that, because the waiting period requires a woman to make two trips to the physician, the waiting period is especially problematic for women who suffer from poverty or abusive relationships. The States reliance on a district court's finding of fact, that the waiting period failed to decrease abortions, is misplaced. The finding was made over twenty years ago without any apparent consideration of the actual number of abortions sought in each year. Further, the State has simply failed to carry its burden to show that the two-day waiting period requirement, mandating the longest waiting period in the country, is narrowly tailored to further its compelling interest in maternal health. The two-day waiting period therefore is unconstitutional.

We likewise conclude that the two-day waiting period has the effect of placing "a substantial obstacle in the path of a woman seeking an abortion," and therefore fails to pass muster under an undue burden analysis. See Casey, 505 U.S. at 878, 112 S. Ct. at 2821. While the statute refers to a "two-day waiting period," the waiting period is actually a three-day waiting period because the patient may not sign the consent form until the "third day following the day [the required] information was given." Tenn. Code Ann. § 39-15-202(d)(1). This extremely long waiting period, the longest in the nation, suggests that the waiting period requirement is not intended as an opportunity for reflection, but is actually intended as an obstacle to abortion.

c. Medical Emergency Exceptions

Finally, it is clear that the medical emergency exceptions are not narrowly tailored to advance the State's interests in maternal health. As the Court of Appeals noted, these medical emergency exceptions are too narrow to pass constitutional muster even under the less exacting undue burden standard. Casey, 505 U.S. at 880, 112 S. Ct. at 2822. The statutes contain two emergency medical exceptions, Tenn. Code Ann. § 39-15-202(d)(3) and -202(g). Subsection 202(d)(3) is a narrow provision addressing the waiting period and states that the two-day waiting period will not apply when the attending physician determines that a waiting period "would endanger the life of the pregnant woman." Subsection 202(g) provides an exception to the informed consent and physician-only requirements and the two-day waiting period requirement when "necessary to preserve the life of the pregnant woman." We initially agree with Planned Parenthood and the Court of Appeals that both exceptions should be read to only cover circumstances where a woman's pregnancy is endangering her life. We decline to read the word "life" to mean "life and health." If the legislature had intended these medical emergency exceptions to cover "life and health" it could have easily said so. See Tenn. Code Ann. § 39-15-201(c)(3) (medical emergency exception to prohibition against post-viability abortions if necessary to preserve the woman's "life or health"). It is well settled that when the words of a statute are plain, clear, and unambiguous, we merely look to the statute's plain language to interpret its meaning. E.g., Schering-Plough v. State Bd. of Equal., 999 S.W.2d 773, 775-76 (Tenn. 1999). In our view, the legislature intended the medical emergency exceptions at issue to protect only the life, as opposed to the health, of the woman.

As written, the medical emergency exceptions fail to pass constitutional muster. They impermissibly impinge upon a woman's fundamental procreational autonomy because they do not contain adequate provisions that will permit immediate abortions necessary to protect a woman's health. For this reason, they also fail to satisfy an undue burden analysis. See Stenberg v. Carhart, ___ U.S. at ___, 120 S. Ct. at 2613.

IV. CONCLUSION

In summary, we hold that a woman's right to terminate her pregnancy is a vital part of the right to privacy guaranteed by the Tennessee Constitution. That right is inherent in the concept of ordered liberty embodied in the Tennessee Constitution and is similar to other privacy interests that have previously been held to be fundamental. We therefore conclude that this specific privacy interest is fundamental. Therefore, the statutory provisions regulating abortion must be subjected to strict scrutiny analysis. After our review of the record and applicable authorities, we conclude that under the Tennessee Constitution, the statutes at issue, Tenn. Code Ann. § 39-15-201(c)(2) (the second trimester hospitalization requirement), § 39-15-202(b), (c) (the informed consent and physician-only counseling requirements), § -202(d)(1) (the mandatory waiting period requirement), and § -202(d)(3) and (g) (the medical emergency exceptions) are unconstitutional because the statutes are not narrowly tailored to further compelling state interests. Accordingly, we reverse the Court of Appeals' judgment that, facially, the

hospitalization requirement, the physician-only counseling requirement, and the waiting period requirement are constitutionally valid. We agree with the Court of Appeals, however, that the medical emergency exceptions are unconstitutional. Consequently, the Court of Appeals' judgment is affirmed in part and reversed in part. This case is remanded to the trial court for entry of a permanent injunction stating:

> Defendants, in their official capacity, are hereby permanently restrained and enjoined from enforcing any provision of Tenn. Code Ann. § 39-15-201(c)(2),(d) and Tenn. Code Ann. § § 39-15-202(b)(c),(d), and (g).

Costs of appeal will be taxed against the State for which execution may issue if necessary.

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E. RILEY ANDERSON, CHIEF JUSTICE